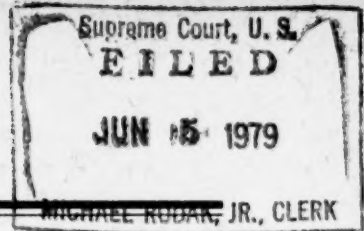


No. 78-1552



In the Supreme Court of the United States
OCTOBER TERM, 1978

JAMES EDWARD COHRAN, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT**

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioner contends that the information in the affidavit submitted in support of a warrant to search his business premises was stale.

Following a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted of receiving, concealing, and storing a stolen truck tractor engine, in violation of

18 U.S.C. 2315 (Count I), transporting the stolen engine and a stolen truck tractor cab in interstate commerce, in violation of 18 U.S.C. 2314 (Count II), and transporting a stolen truck tractor in interstate commerce, in violation of 18 U.S.C. 2312 (Count III).¹ Petitioner was sentenced to a six-year term of imprisonment on Count I, and five-year terms on Counts II and III, all sentences to be served concurrently.

1. In an affidavit (Pet. App. B) filed on April 15, 1976, FBI agent Robert S. Allen alleged that component parts from two stolen truck tractors had been incorporated into a fleet of trucks owned by petitioner's company, Roadrunner Transportation, Inc. The affidavit further stated that one of Roadrunner's trucks was stolen and that another contained a stolen engine (Pet. App. 1b-2b). In support of these allegations, the affidavit recited extensive and detailed information derived from confidential informants, FBI observations, state motor vehicle agency checks, and victims' reports. Specifically, it was alleged that in the fall of 1975 two truck tractors were stolen from a dealer in Atlanta (Pet. App. 4b-5b). Information from a confidential source indicated that the stolen tractors were dismantled in Roadrunner's repair shop and that the engines from the stolen trac-

¹ Petitioner was acquitted on charges of transporting and receiving another stolen engine (Counts IV and V). Count VI, which charged petitioner with removing property to prevent its lawful seizure (18 U.S.C. 2232), was severed by the court and later dismissed on the government's motion.

tors were installed in tractors owned by Roadrunner (Pet. App. 2b-3b). Information from another confidential source indicated that petitioner had arranged the theft (Pet. App. 3b). The source added that in October 1975 he had observed the installation of one of the stolen engines in a Roadrunner tractor (Pet. App. 4b).

The affidavit further stated that an official from Cummins Georgia, Inc., a tractor engine manufacturer, had informed the FBI that in February 1974 his company bought a defective engine from Roadrunner. The official also related that, a short time later, he observed the installation of an engine with no data plate and an obliterated number stamp into the Roadrunner tractor from which the defective engine had been removed (Pet. App. 5b-6b). FBI agent Allen stated that he had seen a vehicle fitting this description on the Roadrunner premises within the previous two months (Pet. App. 6b).

The FBI's recent observations were that all of the Roadrunner vehicles that were to be searched (with two exceptions) had been seen on Roadrunner's premises within the past 10 days (Pet. App. 11b-12b). Moreover, the affidavit recited that J. A. Fuller, a man previously convicted of interstate transportation of stolen vehicles, had recently been seen in and around Roadrunner's office and repair shop (Pet. App. 11b-12b).

On April 15, 1976, on the basis of Agent Allen's affidavit, a magistrate issued 12 search warrants, one for the Roadrunner repair garage, one for its

dispatch office, and one each for 10 truck tractors operated by Roadrunner (R. 175).

2. Petitioner contends that the information in the affidavit² was too stale to support a finding of probable cause at the time the warrants were issued. Although the information placing the stolen property at Roadrunner was between two and one-half and seven months old, the information was sufficient, under the circumstances, to establish probable cause to believe that the stolen items were still on the Roadrunner premises.

The length of time between observations of criminal activity and the execution of a warrant is a factor to be considered in determining whether there is probable cause to search, but each case must be judged on its own facts. *Andresen v. Maryland*, 427 U.S. 463, 478-479 n.9 (1976); *Sgro v. United States*, 287 U.S. 206, 210-211 (1932); *United States v. Weinrich*, 586 F.2d 481, 491-492 (5th Cir. 1978); *United States v. Brinklow*, 560 F.2d 1003, 1005-1006 (10th Cir. 1977); *United States v. Forsythe*, 560 F.2d

² Three additional warrants were issued, each with its own separate affidavit. The first two, issued on April 30, 1976, gave authority to search the two vehicles that were not on the premises at the time of the initial search (R. 104-107). Those vehicles were not found. The third, issued on December 17, 1976, authorized the search of an additional vehicle (R. 112-113). Petitioner makes no independent attack on these warrants, arguing only that they were defective because they were based on information derived from the initial search (Pet. 8). If the initial warrant was valid, these warrants were plainly valid as well.

1127, 1132 (3d Cir. 1977); *United States v. DiMuro*, 540 F.2d 503, 515-516 (1st Cir. 1976), cert. denied, 429 U.S. 1038 (1977). Generally, the nature of the criminal activity and the character of the property sought are determinative. See *Andresen v. Maryland*, *supra*; *United States v. Brinklow*, *supra*; *United States v. Scott*, 555 F.2d 522, 528 (5th Cir. 1977), cert. denied, 434 U.S. 985 (1977); *United States v. Dauphinee*, 538 F.2d 1, 5 (1st Cir. 1976); *United States v. Rahn*, 511 F.2d 290, 293 (10th Cir.), cert. denied, 423 U.S. 825 (1975). The basic question is whether the facts justify an inference that probable cause continues to exist. *United States v. Collins*, 559 F.2d 561, 564 (9th Cir.), cert. denied, 434 U.S. 907 (1977); *United States v. Rosenbarger*, 536 F.2d 715, 719 (6th Cir. 1976), cert. denied, 431 U.S. 965 (1977).

In the present case, the affidavit plainly supported the inference that petitioner was engaged in the continuing activity of possessing and using the stolen tractor parts. Moreover, the stolen items were permanent fixtures in the vehicles, and, since the vehicles had recently been observed on the premises, the inference was justifiable that the stolen objects were still on the premises as well. See *United States v. Brinklow*, *supra*, 560 F.2d at 1006; *United States v. Guinn*, 454 F.2d 29, 36 (5th Cir.), cert. denied, 407 U.S. 911 (1972); *Rider v. United States*, 355 F.2d 192, 193 (5th Cir. 1966). Under these circumstances, the fact that some of the information in the affidavit

was several months old did not affect the propriety of the finding of probable cause.³

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

JUNE 1979

³ Petitioner's reliance on *United States v. Neal*, 500 F.2d 305 (10th Cir. 1974), which also involved interstate transportation of stolen motor vehicles, is misplaced. In *Neal*, the stolen vehicles were quickly disposed of; the objects of the search were vehicle identification plates, credit cards, and other items that the government theorized might have been removed from the stolen vehicles and retained on the defendant's premises (500 F.2d at 309). The court held that there was no basis for concluding that those items, which had been observed on the premises three months earlier, were likely still to be there (*ibid.*). Here, by contrast, the trucks had recently been observed on the premises; the inference that the stolen engine and other parts were still in the trucks was a strong one.